

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHANIEL DARRON JENKINS,

Defendant-Appellant.

UNPUBLISHED

June 12, 2007

No. 270013

Oakland Circuit Court

LC No. 2005-204037-FC

Before: Davis, P.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree criminal sexual conduct based on alternative theories, MCL 750.520b(1)(e) (sexual penetration by an actor armed with a weapon) and MCL 750.520b(1)(f) (sexual penetration and causing personal injury to the victim). Defendant was additionally convicted of possession of a firearm by a person convicted of a felony, MCL 750.224f, two counts of felonious assault, MCL 750.82, possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), possession of marijuana, second offense, MCL 333.7403(2)(d) and MCL 333.7413(2), and three counts of possession of a firearm during the commission of a firearm, MCL 750.227b. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 40 to 60 years for the criminal sexual conduct conviction, 5 to 20 years for the felon in possession conviction, 5 to 15 years each for the felonious assault and cocaine convictions, and time served for the marijuana conviction, those sentences to be served consecutive to concurrent two-year terms of imprisonment for the felony-firearm convictions. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I

Defendant's convictions arise from incidents at the victim's apartment on July 21 and 22, 2005. The victim testified that she met defendant at a club earlier in the year. In May or June 2005, defendant started staying in her apartment. He obtained a copy of the victim's apartment key, without the victim's knowledge. He threatened to harm her, and to find and harm her family, when she asked him to leave. On July 21, 2005, defendant became upset because the victim planned to go out of town for a modeling job. He yelled at the victim, slapped her in the face, and cut her collarbone with a knife. Defendant was also armed with a gun. The victim followed his instruction to go into the bedroom because she was afraid. Defendant penetrated her vagina with his penis and had the victim perform oral sex on him in the bedroom. On the

next day, the victim made a report at the Southfield police station, but was reluctant to pursue the matter. Detective Damiso Davis drove the victim to her apartment. The victim expected to find defendant's sister waiting to do her hair, but only defendant was present. Defendant ordered the victim to take off her pants and smelled her private area to try to determine whether she had sex with the person who dropped her off. He banged his gun against her head, leaving a mark on her forehead.

Detective Davis testified that he was dressed in plain clothes and used an unmarked police vehicle to drive the victim to the apartment building. After driving off and reading the report that the victim wrote at the police station, he decided to go to the victim's apartment. Defendant opened the apartment door. The victim stood behind the door, crying and naked from the waist down. During a pat down search of defendant, Detective Davis found a gun in his back waistband. Cocaine and marijuana were discovered during a search of the apartment. According to the victim, the drugs belonged to defendant.

Defendant testified that he paid the victim for the use of her apartment to conduct drug transactions in July 2005, but did not have a key or reside there. On July 19, 2005, defendant told the victim that he was leaving the state and would not be coming back. On July 21, 2005, defendant went to the apartment to get approximately \$13,000 of his money. He passed out after smoking marijuana and having consensual oral sex with the victim. On the next day, he gave the victim money to buy clothes. Defendant would have left, except that the victim phoned him to request that his sister come over to do her hair. Defendant's sister left the apartment before the victim returned with a visible bruise on her head. Detective Davis came to the apartment and drew a gun on him. He did not identify himself as a police officer until after a tenant walked by. Defendant believed that the victim and Detective Davis wanted his money. He did not know what happened to the money after he was arrested. He denied having a gun, but claimed that his friend, Dexter Chris, gave a gun to the victim.

II

On appeal, defendant claims that the prosecutor engaged in misconduct by cross-examining him about whether he had witnesses or other proof to corroborate his testimony. Defendant argues that the prosecutor's questions impermissibly shifted the burden of proof to him at trial.

Because defendant did not object to the prosecutor's questions on this ground at trial, we consider defendant's argument for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), lv den 463 Mich 928 (2000). Prosecutorial misconduct issues are decided case by case, examining the challenged remarks in context, to determine whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

A prosecutor is entitled to fairly contest evidence presented by a defendant. *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999). In general, a "witness may be cross-examined on any matter relevant to any issue in the case, including credibility." MRE 611(b). "While defendant is free to offer to the jury a defense supported only by his testimony, the nonproduction of other evidence, known and available to defendant, provides the jury with yet

another fact for use to test his credibility.” *People v Gant*, 48 Mich App 5, 10; 209 NW2d 874 (1973). A prosecutor may properly explore the credibility of a defendant’s testimony when he alludes to the possibility that an absent “witness” would exculpate him. *People v Fields*, 450 Mich 94, 108; 538 NW2d 356 (1995).

Here, examined in context, the prosecutor’s cross-examination of defendant regarding whether he had witnesses or other proofs to support his testimony constituted a proper inquiry into the credibility of his testimony. The prosecutor did not call upon defendant to prove his innocence or disprove any elements of the charged offenses, but rather explored the weakness of defendant’s version of the events. Therefore, defendant has not established his claim of a burden-shifting error. Further, to the extent that the prosecutor’s questions could be viewed as improper, a timely objection and request for a curative instruction could have cured the error. Absent an objection, the trial court’s instructions to the jury that “[d]efendant is not required to prove his innocence or to do anything” and that the “prosecutor must prove each element of the crimes charged beyond a reasonable doubt” were sufficient to dispel any perceived prejudice. Hence, reversal is not required. *Watson, supra* at 586-588; *Schutte, supra* at 720-722.

We also reject defendant’s claim that the prosecutor shifted the burden of proof in his closing argument. The prosecutor argued that there were two versions of the events and that defendant’s version was fabricated. The prosecutor’s remark that defendant did nothing to corroborate his story and could not do so because the story was not true did not shift the burden of proof to defendant. The prosecutor was free to comment on the weakness of defendant’s defense and challenge the credibility of defendant’s testimony based on the evidence. *Fields, supra* at 115; *Reid, supra* at 478.

III

Next, defendant argues that he was denied the effective assistance of counsel because defense counsel failed to object to the prosecutor’s questions and argument. Because defendant did not move for a new trial or evidentiary hearing in the trial court based on ineffective assistance of counsel, our review is limited to errors apparent from the record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999). A defendant claiming ineffective assistance of counsel must demonstrate that “trial counsel’s performance fell below an objective standard of reasonableness, and that the representation so prejudiced him as to deprive him of a fair trial.” *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). Consistent with our determination that defendant did not show prosecutorial misconduct, we conclude that defendant’s claim of ineffective assistance of counsel cannot succeed. Defense counsel was not required to make futile objections. *Id.* at 457.

Finally, defendant argues that defense counsel was ineffective by failing to call witnesses to corroborate his testimony. The failure to call witnesses can constitute ineffective assistance where the defendant is deprived of a substantial defense. *People v Kelly*, 186 Mich App 524, 526-527; 465 NW2d 569 (1990). Here, however, there is nothing in the record to indicate how the proposed witnesses would have testified. Defendant has the burden of establishing the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Limiting our review to the record, we are unable to conclude that defendant was denied a substantial defense.

Further, we deny defendant's request for a remand to the trial court to develop factual support for his claim. To properly move for a remand, defendant was required to bring a motion supported by an affidavit or offer of proof setting forth the facts to be established at the evidentiary hearing. See MCR 7.211(C)(1); *People v Hernandez*, 443 Mich 1, 3; 503 NW2d 629 (1993). Based on the existing record, a remand for an evidentiary hearing is not warranted. Cf. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999) (remand denied where the defendant provided only speculation that a witness would provide favorable testimony).

Affirmed.

/s/ Alton T. Davis
/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio